UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

TRIBECA MARKET LLC d/b/a
AMISH MARKET[1]

and Case No. 2-CA-39912

RACHID AHLAL, an Individual

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for the Acting General Counsel
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Harvey S. Mars, New York, New York, for
the Respondent

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on April 30, 2010, and amended on June 14, 2010 by Rachid Ahlal, an individual, a Complaint and Notice of Hearing (the "Complaint") issued on September 30, 2010[2] alleging that Tribeca Market LLC d/b/a Amish Market ("Employer" or "Respondent") violated Section 8(a)(1) of the Act by issuing a written warning to, suspending, and discharging Ahlal in retaliation for his protected concerted activity. The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge if they supported UFCW Local 1500 or engaged in union activities, and interrogated employees regarding their union sympathies. Respondent filed an answer denying the material allegations of the complaint. This case was tried before me on January 10, 2011 in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the "General Counsel") and Respondent I make the following

Findings of Fact

I. Jurisdiction

Respondent is a domestic corporation with an office and place of business located at 53 Park Place, New York, New York, where it is engaged in the business of providing retail food services. Annually, Respondent in the course and conduct of its business operations derives

[1] Respondent stated in its answer that its name had changed from Potato Farm LLC d/b/a Amish Market to Tribeca Market LLC d/b/a Amish Market; General Counsel's motion to amend the complaint to conform to Respondent's Answer in this respect is granted.

[2] All subsequent dates are in 2010 unless otherwise indicated.

gross revenues in excess of $500,000, and receives goods and materials valued in excess of $5,000 directly from points outside the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent operates several retail food stores selling groceries and prepared foods, including salads. Respondent's owners are Jody Vitale and Armagan Tanir. The events at issue in this matter took place at Respondent's 53 Park Place store. Emrullah Erkan is Respondent's Controller, and is employed at the 53 Park Place location.[3] Mehmet Unlu is the Store Manager at the 53 Park Place location, and Hale Minar is the Assistant Store Manager. Josefina Caraballo is the Morning Manager. The parties stipulated, and I find, that all of the foregoing individuals are supervisors within the meaning of Section 2(11) of the Act. Erkan is the only one of these managers who testified at the hearing.

Jamal Uddin works sporadically at the 53 Park Place store.[4] According to Erkan, Uddin is called in to resolve problems with cleaning and maintenance, and generally works at the store for a few weeks at a time. When working at the 53 Park Place store, Uddin is responsible for the seven to eight cleaning and maintenance employees and their supervisor, Marcus Antonio Santos. Erkan testified that Santos makes effective recommendations regarding the hiring and firing of employees in the cleaning and maintenance department. Uddin also speaks Arabic, and has translated for employees who are primarily Arabic-speaking. Uddin did not testify at the hearing.

Within the past several years, United Food and Commercial Workers Local 1500 has been conducting an organizing campaign at Amish Market's stores. On February 24, 2010 there was a representation election conducted at the 53 Park Place store, and Local 1500 was unsuccessful.

Respondent maintains an Employee Information Guide which was distributed to employees at the 53 Park Place store. The Guide contains a section entitled "Dress Policy and Personal Hygiene" which states as follows:

> Appropriate attire is required. We wish to put forth an image that will make us all proud to be Amish Tribeca employees. Be guided by common sense and good taste. Specific standards may be required. The Company issues a hat, shirt and jacket to you. They remain the property of Amish Tribeca and must be returned when employment ceases. Uniforms are to be kept neat, clean and shirts to be tucked into pants. No open toe shoes are to be worn. Good personal hygiene habits must be maintained at all times.
>
> Food handlers in the prepared foods, bakery, produce, specialty, meat and seafood departments must maintain extremely stringent standards for cleanliness and sanitation, which include:

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[3] The complaint was amended at the hearing to allege that Erkan is a manager of Respondent and a supervisor within the meaning of Section 2(11) of the Act.

[4] The complaint was amended at the hearing to allege that Uddin is a statutory supervisor.

- Use of anti-bacterial hand soap,
- Use of sanitary gloves,
- Use of sanitizing solutions to clean tools and surfaces
- Mandatory head coverings, and
- Mandatory ¼-inch or less fingernail length.

B. The Salad Bar department and Serife Maya

Serife Maya is employed at Respondent's 53 Park Place store, and her title is Salad Bar Manager. Maya testified at the hearing that she is responsible for the operation of the salad bar area, including its two employees, alleged discriminatee Rachid Ahlal and Tin Tin Sein. Both Ahlal and Tin Tin testified at the hearing. Ahlal and Tin Tin testified that Maya has referred to herself on numerous occasions as their manager, and has repeatedly told them that they are required to ask her for materials necessary to perform their work, and ask her for permission in order to take time off. Maya and Erkan testified that Maya determines how much of each salad is to be made. Maya testified that she trained Ahlal and Tin Tin when they began working in the Salad Bar department. Maya also assigned specific salads to Ahlal and Tin Tin to prepare on a daily basis (each day Ahlal prepared four chicken salads, a corn salad, a beet salad, and a five-grain salad). Erkan testified that Maya conveys directions and information between Morning Manager Josefina Caraballo and Ahlal and Tin Tin.

On a day-to-day basis Maya prepares salads herself, performing the same work as Ahlal and Tin Tin, and directs Ahlal and Tin Tin in the salads that they prepare.

Maya also signed two attendance notes issued to Ahlal regarding taking days off without permission, one dated June 3, 2009 and one dated July 3, 2009 (the July 3, 2009 documents refers to itself as a "warning"). Maya signed the June 3, 2009 attendance note in an area entitled "Manager's Signature."

Ahlal and Tin Tin prepare ingredients and make salads, including washing, cooking, and chopping vegetables, and combining them to make the finished salad. These tasks are performed in the basement of the 53 Park Place store. Occasionally they also bring salads up from the basement to the main floor of the store, where customers purchase them.

C. Activities of Rachid Ahlal

Ahlal began his employment with Amish Market in October 2008. Ahlal testified that beginning in late 2008, he met with representatives of Local 1500 at a Starbucks near the 53 Park Place store. On August 5, 2009, Ahlal accompanied Local 1500 representatives and other employees to a meeting with Vitale to demand that Respondent recognize the union.

On October 21, 2009, Ahlal filed a complaint with the New York State Division of Human Rights alleging that Respondent was discriminating against him because of his race or national origin. This complaint was dismissed on March 26, 2010 in a letter that Ahlal received a few days later. Sometime after April 2, 2010, the full text of the letter was translated to Ahlal.

Before Thanksgiving 2009, Ahlal contacted the Council on American-Islamic Relations when Respondent refused to grant his request for a day off on the Muslim holiday Eid al-Adha.[5] Ahlal testified that subsequently Uddin asked him about the Council, questioning him about what the group was, whether the group was part of Local 1500, and why Ahlal was talking to them. Ahlal testified that he later met with Caraballo and Uddin regarding the issue. Caraballo asked Ahlal about the Council, and asked whether the Amish Market employees were members. Uddin then told Caraballo that Ahlal would not involve an outside group again. Although Uddin told Ahlal that he had no legal right to the day off he had requested, Ahlal testified that he was ultimately given the day off for the holiday.

D. Complaints of Rachid Ahlal and Tin Tin Sien regarding Serife Maya

According to both Ahlal and Tin Tin, Maya routinely spoke to them in a loud and rude manner, yelling, screaming, and waving her hands at them in front of other Amish Market employees. Ahlal testified that Maya told him and Tin Tin that they were crazy, and told them to shut up. Tin Tin testified that Maya's behavior had reduced her to tears on numerous occasions. Ahlal testified that prior to March 2010 he had complained about Maya's conduct to a number of managers, including Caraballo, Tanir, Unlu, and Erkan, and also to Uddin.

Maya testified that she spoke to Ahlal and Tin Tin in a voice that was a bit higher than a normal conversational speaking voice. Erkan testified that Maya spoke to employees in a high voice and argued with them. Ahlal testified that he and Tin Tin were surprised that management had apparently done nothing regarding Maya's behavior, and decided to approach management to make another complaint.

On or about March 23, Maya confronted Tin Tin because Tin Tin was putting on her uniform and preparing for work after, as opposed to before, punching in with her time card. Tin Tin and Ahlal both testified that when Maya raised the issue with Tin Tin she did so in a loud and aggressive manner. Maya testified that Tin Tin yelled at her during this conversation, and told her that she was going to make a complaint about her to the management. Ahlal testified that he went to the basement that day and saw Maya screaming at Tin Tin. Ahlal testified that he asked whether something was wrong and whether he could help. Ahlal testified that Maya responded by raising her hands and yelling at Ahlal in English and Turkish. Maya testified that Ahlal approached her and Tin Tin in the middle of their discussion, and sided with Tin Tin.

Tin Tin and Ahlal then agreed to go to the management office together and make a complaint about Maya. In the management office, Tin Tin spoke to Caraballo first, telling Caraballo that Maya had confronted her about punching in prior to preparing for work, and complaining about Maya's behavior. Tin Tin then left and Ahlal met with Caraballo separately. Ahlal told Caraballo that he and Tin Tin needed to be treated with respect by Maya. Caraballo asked Ahlal what had happened, and Ahlal explained that he had seen Maya screaming at Tin Tin, and that when he tried to intervene, Maya began screaming at him. Caraballo then called Maya into the office and discussed the incident with her, telling her to try to speak to employees with respect and maintain control over herself. Ahlal testified that Maya responded by yelling at him and Tin Tin to shut up. According to Ahlal, Erkan then entered the office and spoke to Maya in Turkish while she continued to scream, and Caraballo directed Ahlal and Tin Tin to return to work. Maya testified that she told Caraballo that Ahlal and Tin Tin were conspiring

[5] Ahlal testified that the previous year Respondent had granted his request to take the day off for this holiday.

against her, and that she did not want them working as her helpers in the Salad Bar department anymore.

Ahlal testified that Maya did not modify her behavior, and he subsequently went to the office and asked to make a report complaining about the manner in which Maya treated the Salad Bar department employees. He testified that he was not permitted to do so.

On March 30, Tin Tin and Ahlal were called to a meeting in the office with Tanir, Vitale, Caraballo, and Unlu. Tin Tin met with them first, and Tanir asked her about the complaint she and Ahlal had made to Caraballo about Maya. Ahlal then met with the managers, and complained that Maya was cursing him in Turkish, or was yelling, screaming, and raising her hands. Ahlal asked that the managers write a report regarding Maya's behavior, because he believed that a report might result in Maya's treating them with more respect. Tin Tin testified that about ten or fifteen minutes after she left the meeting, Maya was "looking for trouble" again, but could not recall the details.

E. Statements of Serife Maya regarding Local 1500

During the week prior to the February 24 election, Respondent distributed leaflets to the employees opposing Local 1500. These leaflets stated that "Local 1500 has been bad for you and Amish Market Tribeca" because the union had "hurt our business and put all of our jobs at risk," and that "We will survive Local 1500's attempts to destroy our jobs and our business."

Tin Tin testified that the day after the election, in the refrigerator in the work area, Maya asked Tin Tin "yesterday did you vote for the union?" Maya also told Tin Tin that she knew Tin Tin had voted for the union. Maya told Tin Tin that if the boss found out that she had voted for the union, he might fire her. Ahlal also testified that the morning after the election Maya was listening to loud music and dancing, saying that the union lost the election. Ahlal testified that Maya told him that the employees who voted for the union would be fired, and that she would "show" these employees and the union "that they can't do anything."

Maya testified that she only spoke to employees regarding the union on one occasion during a meeting. She testified that she told the employees that there was no need for a union, because the employees received vacation pay and other benefits, could speak to management regarding complaints, and were treated well.

F. Events of April 2, 2010

On April 2, Ahlal arrived at work at the start of his shift, 6:30 a.m., and put on his uniform, a smock. However, he attached a sign to the chest of his uniform that said, "Hunger Strike," "Strike talk," and "Stop Amish Market Discrimination." Ahlal also placed a white adhesive label over his mouth, on which he had written "Stop Discrimination in Amish Market." Ahlal testified that the sign and label were intended to protest the manner in which Maya had treated him and Tin Tin, and management's failure to take any action in response to Ahlal and Tin Tin's complaints. Although Ahlal brought additional labels which he intended to provide to other employees should they wish to wear them, none of the other employees did so.

Thus attired, Ahlal went to his work station, and began his work preparing and chopping vegetables for the salads, using knives and other implements in the usual manner. For the first two hours of his shift Ahlal performed his customary work chopping vegetables and preparing salads, but did not speak. About ten or eleven other employees were present, preparing food,

and there were several supervisors and managers in the management office. Ahlal, Tin Tin, Erkan, and Maya all testified that Ahlal did not threaten anyone, or make any obscene gestures.

Erkan arrived at approximately 8:30 a.m., about two hours after Ahlal began his shift. Erkan testified that one of the employees approached him and asked him if he intended to do anything about Ahlal, because she found his behavior "weird." Erkan testified that the other employees were performing their work, but also paying attention to Ahlal and to Erkan's subsequent interactions with him. When he saw Ahlal's sign and label, Erkan contacted the owners (presumably Vitale and Tanir) and the company's attorney to discuss the situation with them. They subsequently directed Erkan's interactions with Ahlal. Erkan took a photograph of Ahlal. Erkan then approached Ahlal and asked him to come with him to the office, but Ahlal refused to do so. Erkan then asked Ahlal to take off his sign and label, telling Ahlal that it "doesn't look right in the work place," and Ahlal responded by pointing his index finger at his sign. Erkan specifically testified that this did not constitute any sort of obscene gesture toward him. After consulting again with Vitale and Tanir, Erkan asked Ahlal to leave the store and take a sick day, and Ahlal refused.

After consulting again with the owners, Erkan called the police, who arrived and escorted Ahlal from the store. Erkan testified that he told the police over the phone that an employee had signs stating "hunger strike" and "strike talk" which "disturb[] the working situation," and was refusing to leave. When the police arrived, they told Erkan that they could not remove Ahlal from the store unless Ahlal was being discharged. Erkan responded that "the working condition is bad, and this guy is working with the knives and there are some employees that are freaked out. If anything happens you are responsible." The police officers approached Ahlal, and asked him what was going on. Ahlal responded by writing a question – whether he had the right to strike – on a piece of paper. The police officer asked Ahlal to remove the tape from his mouth, and Ahlal wrote that he would not. Although Ahlal told the police officer that he had no intention of hurting himself or anyone else, the police officer told Ahlal that he had to remove the tape from his mouth or leave. When Ahlal refused to remove the tape, the police officers escorted him out of the store and into an ambulance. Ahlal was taken by the police to Bellevue Hospital, where he remained for approximately 30 hours.

G. Subsequent events and Rachid Ahlal's discharge

Ahlal testified that although he was scheduled to work on Monday and Tuesday, April 5 and 6, he did not go to work because he needed to rest after spending almost three days awake and frightened while at Bellevue Hospital.

Ahlal returned to the 53 Park Place store on Wednesday, April 7, in the late morning. Ahlal went to the office and met with Erkan, who gave him a paycheck. Erkan asked Ahlal why he had not reported for work on Monday and Tuesday. Erkan testified that at that point he was under the impression that Ahlal had quit his job, because he had spoken to a Dr. Ackerman after receiving a message from Bellevue Hospital on Monday, April 5. Erkan testified that he had called Dr. Ackerman, who told him that Ahlal had decided to quit his job. Ahlal testified that he told personnel at Bellevue Hospital that when he left the Hospital he would either return to Amish Market and work or look for another job.

Ahlal told Erkan that he had not reported for work on Monday and Tuesday because he had not been feeling well, and stated that he had not quit his job. Ahlal testified that he asked Erkan whether he was still employed, and Erkan told him that he would speak with management. Erkan testified that Ahlal said that he would not be coming to work for the rest of the week because he did not feel well, and Erkan suggested that they speak on Friday. Ahlal

testified that he never told Erkan that he would be out for the entire week, and that Erkan stated that he would call Ahlal on Friday after speaking with the owners. Erkan testified that he also told Ahlal that he would have to provide some sort of note stating that he had not been feeling well. Erkan testified that on Thursday, April 8, 2010, he related these events to Vitale and Tanir, who then informed him that Ahlal would also have to obtain a report from Bellevue Hospital stating that he was not a danger to anyone at Amish Market.

On Friday, April 9, Erkan called Ahlal at about 4:30 p.m. and left a message, which Ahlal returned. The two spoke late in the afternoon, at about 5:30 or 6:00 p.m. Erkan told Ahlal that he needed to obtain a report from Bellevue Hospital stating that he was not a danger to anyone at Amish Market. Erkan told Ahlal that he needed to bring this report to work on Monday morning. Ahlal and Erkan both testified that Ahlal stated that he thought it might be too late to obtain such a report, and Erkan asked him to try to do so. Ahlal testified that Erkan stated that this was management's decision.

Erkan testified that no one from Amish Market management heard from Ahlal after that time. Ahlal testified that he did not return to work on Monday because he could not bring the report management had requested. Ahlal testified that on Tuesday or Wednesday he returned to Bellevue Hospital and saw a social worker who had been at the hospital during the weekend. Ahlal testified that he told her that he needed a paper for his job, but she did not respond to him. According to Ahlal, he also called a telephone number for Bellevue Hospital printed on a bill that he received, but no one answered.

On April 16, at the direction of Vitale and Tanir, Erkan wrote a letter to Ahlal, at the behest of Vitale, terminating Ahlal's employment.[6] Erkan letter states that "Due to your extended absence from work for the past 10 business days and failure to communicate with the office or a manager, we assume you have resigned from Amish Market. We accept your resignation and your employment with Amish Market is terminated effective immediately."[7]

III. Analysis and Conclusions

A. Respondent Violated Section 8(a)(1) when Serife Maya Threatened and Coercively Interrogated Employees in connection with the Union Election

1. The evidence establishes that Serife Maya is an agent of Respondent within the meaning of Section 2(13) of the Act

The evidence is insufficient to establish that, as the complaint alleges, Serife Maya is a supervisor within the meaning of Section 2(11) of the Act. The evidence does not establish that Maya is a statutory supervisor, in that it is apparent from the record that Maya is unable to effectuate or effectively recommend any of the personnel actions enumerated in Section 2(11). In fact, the evidence establishes that when Maya told Morning Manager Josefina Caraballo in late March 2010 that she no longer wanted Ahlal and Tin Tin working with her because they were conspiring against her, no action was taken against Tin Tin on that basis.

[6] Erkan testified that Vitale and Tanir made the decision to discharge Ahlal, and that he (Erkan) was only present when the decision was made.

[7] Ahlal apparently did not receive the termination letter sent to him, because he had moved from the address that Erkan used.

However, the evidence establishes that Maya is an agent of Respondent within the meaning of Section 2(13) of the Act at the time of her conversations with Ahlal and Tin Tin regarding the union. It is well-settled that the Board applies common law agency principles to determine whether an employee is acting with apparent authority on behalf of the employer when making a particular statement. *Pan Oston Co.*, 336 NLRB 305, 305-307 (2001); *see also Facchina Construction Co.*, 343 NLRB 886, 886-887 (2004). The Board evaluates whether, under the particular circumstances involved, "employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." *Facchina Construction Co.*, 343 NLRB at 887.

I find that Ahlal and Tin Tin would have reasonably believed Maya to be reflecting company policy and speaking and acting on Respondent's behalf at the time she made the statements discussed below. The evidence establishes that, as Erkan testified, Maya was a conduit for information between Caraballo and Ahlal and Tin Tin. Maya trained Ahlal and Tin Tin, and gave them both regular work assignments (specific salads that they prepared every day) and daily instruction and direction. Maya was responsible for Ahlal and Tin Tin's work, and corrected their work if there were problems. When Ahlal and Tin Tin needed time off they were required to request permission from Maya, and she signed the two attendance notes issued to Ahlal in the summer of 2009. Maya repeatedly identified herself to Ahlal and Tin Tin as their manager, and told them that any requests for materials or time off had to be made through her. Given these circumstances, Ahlal and Tin Tin would have reasonably believed that Maya acted on Respondent's behalf. *Facchina Construction Co.*, 343 NLRB at 887 (foremen who made daily assignments and work instructions, were responsible for overseeing and fixing incorrect work, approved time off, and conveyed information between management and employees agents within the meaning of Section 2(13)).

2. Maya coercively interrogated employees and threatened employees with discharge in retaliation for their union support and activities, in violation of Section 8(a)(1)

The evidence establishes that on February 25, the day after the Local 1500 representation election, Maya threatened Ahlal and Tin Tin with discharge in retaliation for their union support and activities, in violation of Section 8(a)(1). Tin Tin testified that the day after the election Maya asked Tin Tin whether she voted for the union, and told Tin Tin she knew that Tin Tin had voted for the union. Maya then told Tin Tin that if the boss found out that she voted for the union, she would be fired. Ahlal testified that Maya told him the day after the election that the employees who voted for the union would be fired, and that she would show these employees and the union that they could not do anything. Maya's statements to Tin Tin and Ahlal both constitute threats of discharge in violation of Section 8(a)(1). *Universal Laundries and Linen Supply*, 355 NLRB No. 17, p. 10 (2010).

Maya's statements to Tin Tin also constitute an unlawful interrogation. The Board determines whether questioning regarding union activities is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Here, the majority of these factors militate in favor of a finding that Maya's questioning was impermissibly coercive. Maya's questioning of Tin Tin occurred the day after the representation election, which was preceded by an anti-union campaign on Respondent's part in which Maya actively participated. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17 (2010) (unlawful questioning took place "in the context of an ongoing anti-union campaign"). There is no evidence of any personal relationship between Maya and Tin Tin, and in fact Tin Tin testified that Maya was unremittingly hostile toward herself and Ahlal, reducing her to tears on any

number of occasions. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17 (questioning impermissible where no evidence of personal friendship between agent and employees); *compare Smithfield Packing*, 344 NLRB 1, 2 (2004). Maya approached Tin Tin while Tin Tin was alone in the refrigerator, and her statements were clearly designed to discover how Tin Tin had voted in the election, as opposed to general questions or innocuous conversation. *See Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17, 18 (agent's contact with employee "neither casual nor accidental"). Indeed, Maya's questioning of Tin Tin culminated in the threat of discharge described above. Given these circumstances, Tin Tin understandably did not tell Maya how she had voted. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17. Based on the foregoing I find that Maya unlawfully interrogated Tin Tin in violation of Section 8(a)(1) of the Act.

I credit Tin Tin and Ahlal's testimony regarding these events. Tin Tin is still employed by Respondent, and her testimony may therefore be considered particularly reliable in that it is potentially adverse to her own pecuniary interests, as the Board has noted. *Covanta Bristol, Inc.*, 356 NLRB No. 46 at p. 8 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995). Indeed, not only is Tin Tin a current employee, but Erkan thought so highly of Tin Tin's work that he testified that she was the best employee in the 53 Park Place store. Tin Tin and Ahlal provided relatively specific, detailed accounts of their interactions with Maya, both of which involved similar statements on Maya's part.

On the other hand, I do not find Serife Maya to be credible with respect to her statements to Ahlal and Tin Tin, and do not find her to be a credible witness overall. In her testimony, Maya repeatedly denied ever having spoken to employees regarding Local 1500 (Tr. 203, 221), only to later admit that she informed employees at a meeting that she saw no reason to have a union because Respondent treated the employees well (Tr. 223). She was not questioned regarding and never specifically denied making the statements alleged by Tin Tin and Ahlal, justifying an adverse inference in that respect. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063, n. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640, n. 15 (1995). In addition, as discussed elsewhere, Maya testified that she believed Tin Tin and Ahlal were conspiring against her and specifically engaging in conduct out of "spite" for her (Tr. 204, 206). As discussed *infra*, she provided conflicting testimony regarding the events of April 2, first stating contending employees avoided Ahlal that day out of fear, and later stating that they moved away from him when the police approached him (Tr. 207-208, 223). She also attempted to offer accounts of events she did not witness, describing interactions she did not see or hear between Ahlal and the police after Ahlal was escorted from the building and placed in a police car (Tr. 210). She made gratuitous, unsolicited criticisms of Ahlal's work performance and conduct after his discharge, claiming that he was regularly late for work and left Respondent's employ to go to France (Tr. 208-209, 211-212). Finally, toward the end of her testimony she stated that she could not remember when she told Caraballo that Tin Tin and Ahlal were conspiring against her, stating by way of illustration that "I hardly remember my birthday" (Tr. 227). As a result, I have not credited Maya's testimony where it is contradicted by that of other witness, and have generally viewed her testimony with skepticism.

For all of the foregoing reasons, I credit the testimony of Tin Tin and Ahlal regarding Maya's statements, and find that Maya unlawfully interrogated employees and threatened them with discharge, in violation of Section 8(a)(1) of the Act.

B. Respondent Violated Section 8(a)(1) of the Act by Suspending and Discharging Ahlal in Retaliation for his Protected Concerted Activities

1. General principles

Under Section 8(a)(1) of the National Labor Relations Act (the Act), an employer may not "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" by Section 7 of the Act.[8] In order to determine whether an employee's discharge, or other adverse action against them, violated the Act, the Board utilizes the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's decision to take action against them. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct, *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB at 280, n. 12 (1996).

2. Ahlal's conduct on April 2 constituted protected concerted activity

I find that Ahlal's conduct on April 2 – the sign affixed to the chest of his clothing stating, "Hunger Strike," "Strike talk," and "Stop Amish Market Discrimination," and the white adhesive label over his mouth stating, "Stop Discrimination in Amish Market," together with his refusal to speak – constituted protected concerted activity within the meaning of Section 7 of the Act.

I find that the evidence establishes that Ahlal's conduct on April 2 was intended to protest the manner in which he and Tin Tin were treated by Serife Maya. It is well-settled that "complaints regarding the quality of supervision are directly related to working conditions," and thus may form the basis for protected concerted activity. *Industrial Hard Chrome, Ltd*., 352 NLRB 298, 309-310 (2008). It is clear that Ahlal and Tin Tin had long-standing problems with the manner in which Maya spoke to them, and that Ahlal had complained regarding Maya's behavior previously. I credit their testimony regarding Maya's conduct, and note that it is supported by Erkan's testimony that Maya "usually has a problem with everyone around her," because she "speaks in a high voice" which offends other employees (Tr. 149-150).[9] The evidence also establishes that Ahlal and Tin Tin complained to Caraballo on March 23 regarding Maya, after Ahlal walked in on Maya screaming at Tin Tin that day. On March 30, Tin Tin and Ahlal were summoned to another meeting with Tanir, Vitale, and Caraballo regarding Maya, during which they described her behavior, and Ahlal specifically requested that a report be written to encourage Maya to treat them more respectfully. This sequence of events strongly

[8] Section 7 of the Act provides that "employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[9] While Erkan testified that he had never heard Maya yell at Tin Tin or Ahlal, he stated that he had heard that she had been involved with disputes with other departments.

supports a finding that Ahlal's conduct two days later was intended to protest Maya's treatment of himself and Tin Tin, which management had, in his view, failed to adequately address.

I find also that Ahlal's conduct on April 2 was concerted in nature, as it was both the continuation of his and Tin Tin's previous concerted complaints regarding Maya's conduct, and an inducement to other Amish Market employees.[10] *See*, *e.g.*, *Tampa Tribune*, 351 NLRB 1324, 1325 (2007) (single conversation with supervisors concerted when "part of an ongoing collective dialogue" between Respondent and its employees and a "logical outgrowth" of prior concerted activity); *Circle K Corp.*, 305 NLRB 932, 933-934 (1991) ("invitation to group action" concerted activity regardless of its outcome).

Respondent argues that Ahlal's April 2 conduct was not protected under Section 7, because Ahlal's behavior caused disruption in the workplace, jeopardized the safety of other employees, damaged the company's reputation with its patrons, and violated the company's dress code – "special circumstances" which removed Ahlal's conduct from the protection of Section 7 and permitted Respondent to prohibit it. Respondent relies for this analysis on the line of cases which developed such an exception to the general protections afforded to employees' display of union insignia in the workplace in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), arguing that the same reasoning is applicable here by analogy. *See, e.g., Komatsu America Corp.*, 342 NLRB 649 (2004). In that context, employees are presumptively entitled to express concerns relating to the employment relationship by wearing union insignia or other pertinent messages, unless the employer demonstrates that "special circumstances" such as safety, damage to product, exacerbation of employee dissension, and undue interference with a cultivated public image override the employees' Section 7 interests. *Komatsu America Corp.,* 342 NLRB at 650; *see also Pathmark Stores*, 342 NLRB 378, 379 (2004); *Government Employees*, 278 NLRB 378 at 384-385.

Although the instant case involves protected concerted activity, as opposed to union activity, I find that the general principles articulated in *Republic Aviation Corp.*, and in *Komatsu America Corp.* and subsequent cases, are instructive here. The Board has in the past applied this analysis to find that employee attire which addresses employment-related issues but does not involve displays of union insignia is nevertheless protected. For example, in *Hawaii Tribune-Herald*, 356 NLRB No. 63 at p. 1, 18-19 (2011), the Board found that the wearing of buttons exhorting the employer to reinstate a specific employee, and red armbands to protest the employee's suspension, was protected activity, even in the absence of union insignia. The Administrative Law Judge, affirmed by the Board, characterized the buttons as "a protest" of the particular employee's suspension, and "an expression of their exercise of [the employees'] rights guaranteed in Section 7 of the Act to engage in concerted activity for their mutual aid or protection." *Hawaii Tribune-Herald*, 356 NLRB No. 63 at p.18; *see also AT&T Connecticut*, 356 NLRB No. 118 at p. 1 (2011) (employee t-shirts stating "Prisoner of AT$T" and "Inmate #" in support of union during collective bargaining, but devoid of union insignia, were nevertheless protected); *Government Employees*, 278 NLRB 378, 384-385 (1986) (red armbands stating "hostage/striker" referred to ongoing labor dispute and were protected, despite absence of union name or insignia). In at least one case, the Board specifically stated that the failure of a t-shirt to explicitly name the union in question was immaterial given Section 7's protection of concerted employee activity, in addition to union activity. *See Southwestern Bell Telephone*, 200 NLRB 667, 669 (1972) (failure of t-shirts to explicitly name union irrelevant given Section 7 protection of concerted employee activity for mutual aid or protection in the absence of a union). As a

[10] Respondent does not contend in its Post-Hearing Brief that Ahlal's conduct was not concerted activity.

result, there is no basis for concluding that the protections articulated in *Republic Aviation* – and the established exception to that general rule – would not extend to the concerted display of messages or other expression pertaining to the employment relationship in situations without a union context.

I will therefore consider whether Ahlal's display and conduct on April 2 created the special circumstances which Respondent contends removed his activities from the protection of Section 7. In cases arising under this exception to *Republic Aviation Corp.*, the Board has stated that the employer must introduce "substantial evidence" to establish the special circumstances which justify its prohibition of union insignia or messages related to the employment relationship. *Escanaba Paper Co.*, 314 NLRB 732, 733, n. 4 (1994), *quoting Government Employees,* 278 NLRB at 385.

I find that Respondent has not introduced evidence sufficient to meet this burden. The statements Ahlal wore on his chest and face on April 2 were not vulgar or obscene,[11] and were not potentially racially or ethnically inflammatory, as in previous cases where an employer's prohibition on employee expression met with Board approval. *See, e.g., Leiser Construction, LLC*, 349 NLRB 413, 415 (2007) (hardhat sticker depicting urination on a "non-union" rat may be prohibited); *Southwestern Bell*, 200 NLRB 667, 669-670 (1972) (no violation to prohibit sweatshirt reading, "Ma Bell is a cheap Mother"); *Komatsu American Corp.*, 342 NLRB at 650 (Japanese-owned employer permissibly prohibited T-shirt stating "December 7, 1941," and "History Repeats Negotiate Not Intimidate" to protest outsourcing of work). Nor did the statements affixed to Ahlal's clothing and face somehow disparage Respondent's product in a manner designed to possibly interfere with Respondent's relationships with customers. *See, e.g., Pathmark Stores*, 342 NLRB at 379 (t-shirt reading "Don't cheat about the Meat" potentially interfered with customer relationship and could thus be prohibited); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (employer operating a Kosher bakery may lawfully prohibit T-shirt which stated, "If its not Union, its not Kosher").

The evidence is also insufficient to establish that Respondent's public image was somehow damaged by Ahlal's possibly coming into view of customers on April 2. Although the evidence demonstrates that Ahlal was generally expected to transport salads up to the selling floor several times each day, there is no specific evidence as to how often this may have occurred on April 2, how many customers, if any, were present at the time, and how, if at all, those customers responded to Ahlal's attire. Certainly, Ahlal did not have the continuous contact with the public which the Board has found relevant in cases where employer prohibitions on the display of union messages are justified by the special circumstance of maintaining a coherent public image. *See, e.g., Bell-Atlantic-Pennsylvania*, 339 NLRB 1084, 1086-1087 (2003) (deferring to arbitration award upholding suspensions of "customer contact" employees for wearing t-shirt depicting employees as "Road Kill" as a result of layoffs); *Pathmark Stores, Inc.*, 342 NLRB at 378-379 ("Don't cheat about the Meat" hats and t-shirts worn by employees working in a glass-enclosed area could be easily read by shoppers in employer's meat department). In any event, the possibility of contact with customers is in and of itself insufficient to satisfy Respondent's burden to establish "special circumstances." *See Nordstrom, Inc.*, 264 NLRB 698, 700 (1982); *Virginia Electric & Power Co.*, 260 NLRB 408 (1982). In this context, I also find that Ahlal's violation of Respondent's dress code, if any, did not constitute "special circumstances." Respondent's dress code, as applied to food preparation workers such as

[11] It bears repeating that Erkan testified that Ahlal did not make any threatening or obscene gestures in connection with his attire.

Ahlal, appears to be primarily intended to maintain sanitary conditions, and there is no evidence that the statements Ahlal affixed to his shirt and face created some sort of unsanitary condition.

Respondent's contention that the statements Ahlal placed on his attire and face interfered with production is likewise not supported by the evidence. It is undisputed that during the two hours or so before Erkan called the police on April 2, Ahlal performed the same work preparing vegetables and salads that he did every day. While Respondent argues that Ahlal's refusal to speak somehow interfered with his work and that of Tin Tin and Maya, the evidence is clear that the vast majority of the communication among the three of them consisted of Maya telling Ahlal and Tin Tin quite forcefully what to do. Nor is there substantial evidence that the work of other employees was precluded or hampered by Ahlal's conduct. While Erkan contended that the other employees were "taking advantage of the situation" and "it was not possible to work in that environment," he also admitted that the other employees were performing their jobs at the time. While Maya originally testified that the other employees were avoiding Ahlal because they were frightened by him, she later admitted that they moved away from him only when the police, called by Erkan, arrived and approached Ahlal. In any event, I do not credit her testimony regarding the responses of the other employees, for the reasons discussed previously. Finally, Respondent introduced no evidence that it needed to take any additional measures – such as calling in another employee or requiring employees to work overtime – in order to compensate for the work allegedly not performed because Ahlal's conduct disrupted productivity.

Finally, I reject as inconsistent with the evidence Respondent's argument that Ahlal was somehow dangerous, and that his protected concerted activity was in fact potentially violent behavior, which constituted "special circumstances" and justified Respondent's conduct toward him. Every witness addressing the issue – including Erkan – testified that Ahlal did not engage in any threatening or obscene behavior of any kind on April 2. The record establishes that Ahlal had been employed by Respondent for two years without any sort of incident of violent, threatening, or even odd behavior; the only disciplinary history in the record consists of the two attendance notes from the summer of 2009. There is no evidence that Ahlal was involved in any sort of conflict with another employee, or that any of Respondent's managers believed him to be. On the contrary, Respondent was well aware from the repeated complaints of Ahlal and Tin Tin, and from their own observations (as evinced by Erkan's testimony), that Ahlal and Tin Tin both had long-standing complaints regarding Maya's loud, derogatory behavior. Given the complaints of both Ahlal and Tin Tin just days earlier, it is incredible that Respondent would legitimately consider Ahlal's conduct on April 2 to be potentially violent, as opposed to a protest to express his frustration with management's refusal to address Maya's conduct in what he considered to be an effective way.

In evaluating Respondent's arguments regarding the special circumstances which render Ahlal's display unprotected, it is important to note that neither of the two managers who actually made decisions regarding Respondent's dealings with Ahlal on April 2 – Tanir and Vitale – testified at the hearing. In his testimony, Erkan stated that he relayed information to Tanir and Vitale from the store on April 2, but did not make the ultimate decisions regarding Respondent's conduct toward Ahlal. Erkan testified, for example, that Tanir and Vitale directed him to tell Ahlal to take off the messages affixed to his chest and face, that Tanir and Vitale instructed him to ask Ahlal to leave when Ahlal refused to do so, and that Tanir and Vitale told him to call the police when Ahlal did not leave the store. Respondent's failure to call as witnesses the managers who actually made these determinations – particularly the extreme step of involving law enforcement – is a significant factor in evaluating whether it has established that special circumstances involving safety, employee productivity, or public image rendered Ahlal's display unprotected. *See Lansing Automakers Federal Credit Union*, 355

NLRB No. 221, at p. 9, fn. 15 (2010) (adverse inference regarding asserted privilege of report on employees' cash "gifting circle" drawn from Respondent's failure to call manager who ordered investigation and preparation of report, determined whether to consult with Respondent's attorneys, and decided which employees to discharge); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) (drawing adverse inference from failure to call manager competent to explain decision to subcontract work).

For all of the foregoing reasons, I find that Respondent has not provided the substantial evidence necessary to establish special circumstances which would remove Ahlal's concerted activities on April 2 from the scope of Section 7's protection. As a result, I find that Ahlal was engaged in protected concerted activity on April 2, 2010.

3. The General Counsel has established a *prima facie* case that Respondent suspended and discharged Ahlal in retaliation for his protected concerted activities

I find that the General Counsel has established a *prima facie* case that Respondent suspended and discharged Ahlal in retaliation for his protected concerted activities. Respondent was obviously aware of Ahlal's conduct on April 2, and was also aware of Ahlal's complaints regarding Maya made both earlier that week and previously. I find that the General Counsel has established that Respondent exhibited animus regarding the employees' union and protected concerted activity. As discussed above, Respondent violated Section 8(a)(1) when Maya coercively interrogated employees and threatened them with discharge in retaliation for their union activities. *See Austal USA, LLC*, 356 NLRB No. 65 at p. 1-2 (2010) (Section 8(a)(1) violations constitute evidence of animus); *Bally's Atlantic City*, 355 NLRB No. 218 at p. 9 (2010). Maya also told Caraballo that Ahlal and Tin Tin were "conspiring" against her, and that she no longer wanted them working with her – in effect, that they should be discharged.

I find that the timing of Ahlal's discharge – within weeks after the protected concerted complaints regarding Maya which culminated in his activities on April 2 – also supports the conclusion that Ahlal was unlawfully terminated. *See, e.g., Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1193 (2004) (timing of discharge which occurred two weeks after testimony in a Board proceeding suspect); *Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003) (discharge "within a few weeks" of Respondent's discovery that discriminatee was "a leading union organizer" suspect).

For all of the foregoing reasons, I find that the Acting General Counsel has established a *prima facie* case that Ahlal was suspended and discharged in retaliation for his protected concerted activity.

4. Respondent has not met its burden to show that it would have suspended and discharged Ahlal absent his protected concerted activities

Respondent contends that Ahlal was discharged because he abandoned his position, in that he did not return to work after his conversation with Erkan on Friday, April 9. I find that the evidence does not substantiate this asserted non-discriminatory reason for Ahlal's discharge, and that Respondent's justification is in fact pretextual.

I find that Respondent suspended Ahlal on April 7, in that I find that when Ahlal returned to the 53 Park Place store that day, Erkan directed him not to return, and told Ahlal that he would be contacted regarding the status of his employment on April 9. While Respondent claims that Ahlal suggested that the company contact him on Friday, April 9 as to the status of his continued employment, the evidence does not support this contention. As is apparent from

the testimony, Erkan's recollection was that he, as opposed to Ahlal, suggested that the two of them speak again on Friday (Tr. 190-191). It is also apparent from the record that Erkan was required to consult with Vitale and Tanir prior to making any personnel decisions regarding Ahlal's continued employment, and that he did so on April 8, to determine what to tell Ahlal the next day. The evidence therefore suggests more convincingly that Erkan told Ahlal to remain at home until being contacted on April 9, and not that Ahlal withdrew himself from the workplace. As a result, I credit Ahlal with respect to this issue.

Respondent claims that Ahlal failed to comply with its attendance policy by failing to inform management that he would not be reporting to work on April 5 and 6.[12] However, it is evident that Respondent did not suspend and discharge Ahlal on that basis. As discussed above, when Ahlal returned to the store and met with Erkan on April 7, Erkan, as directed by Vitale and Tanir, arranged to speak with Ahlal on Friday, April 9 so that he could again consult with Vitale and Tanir regarding Ahlal's employment status. The evidence therefore establishes that Ahlal was not discharged, nor was he considered by Respondent to have quit his job, prior to April 9. Furthermore, Respondent was aware from Erkan's conversation with Dr. Ackerman that Ahlal was confined at Bellevue Hospital for approximately three days after the police removed him from the 53 Park Place store at Erkan's behest. Respondent, was not, therefore, completely unaware of Ahlal's whereabouts or the medical treatment to which he was subjected on April 2, 3, and 4. Indeed, as Respondent well knew, Ahlal's weekend ordeal was engendered by Respondent's conduct in reaction to his protected concerted activity.

In addition, the evidence establishes that Respondent's treatment of Ahlal on April 7 and 9 set up conditions for returning to his job that Ahlal would be unable to fulfill. Erkan testified that on April 7, he informed Ahlal that he would need to bring a doctor's note regarding his absence in order to return to work. However, in his conversation with Ahlal on April 9, Erkan informed Ahlal that in order to return to work he had to obtain a report from Bellevue Hospital stating that he was not a danger to anyone at Amish Market. Erkan testified that this new requirement was established by Vitale and Tanir during a conversation with them on April 8. However, it is undisputed that Erkan did not call Ahlal on April 9 until 4:30 p.m., and that Ahlal was not informed until about an hour later that he was required to provide a report regarding his mental status by the start of his shift, 6:30 a.m., on Monday morning.

I find that these changing demands on Respondent's part indicate that Respondent was determined to impose conditions on Ahlal's returning to work that he was unable to meet, and are therefore pretextual. The requirement that Ahlal provide doctor's note explaining his absence, while ordinarily a routine matter, is suspect in this instance. As discussed above, not only did Respondent know that Ahlal was in Bellevue Hospital on April 2, 3, and 4, but Ahlal's absence on April 5 and 6 was caused by events engendered by Respondent's conduct in reaction to Ahlal's protected concerted activity.

The requirement that Ahlal provide a report from Bellevue Hospital stating that he was not a danger to anyone at Amish Market is even more dubious. Respondent provided no evidence that it required such "fitness for duty" opinions of employees returning from a medical absence generally. Nor did Respondent provide a specific justification for demanding a psychiatric opinion in Ahlal's case. As discussed above, there is no evidence that Ahlal's conduct on April 2 was threatening, obscene, or otherwise offensive. There is no evidence of

[12] General Counsel adduced no evidence in support of the complaint's allegation that Respondent issued a written warning to Ahlal on April 5, and does not discuss this allegation in its brief. As a result, this allegation (paragraph 6(b) of the complaint) is dismissed.

any history of erratic behavior during Ahlal's two years of employment. Respondent appears to have based its demand for a psychiatric evaluation prior to Ahlal's return to work entirely on the fact that Ahlal engaged in protected concerted activity on April 2. Respondent's imposition of special conditions on Ahlal as a direct response to his protected concerted activity indicates that its requirement that he provide a psychiatric evaluation stating that he was fit to return to work was pretextual. As a result, Respondent's termination of Ahlal for failing to comply with that condition was similarly the product of unlawful motivation. *See Glasforms, Inc.*, 339 NLRB 1108, 1111 (2003) (employee's failure to satisfy conditions created as a result of employer's unlawful motivation a pretextual reason for discharge). The increasing complexity and burdensome nature of Respondent's changing demands regarding the documentation that Ahlal obtain – from the justification of a two day absence to a psychiatric evaluation and fitness for duty report – also indicate that it was establishing requirements it intended that Ahlal could not satisfy. *See Fivecap, Inc.*, 332 NLRB 943, 944 (2000) (unprecedented demand for fitness for duty evaluation after employee obtained doctor's note excusing absence unlawfully motivated). Finally, Respondent's admitted failure to inform Ahlal of the more onerous requirement until he had only two weekend days to complete it indicates that it was specifically interested in precluding Ahlal from resuming work.

In reaching these conclusions, I note in particular Respondent's failure to call Vitale and Tanir to testify, or to provide any other evidence elucidating the reasons for Respondent's conduct with respect to the critical decisions at issue in this case. It is apparent from Erkan's testimony that Vitale and Tanir formulated Respondent's course of conduct, including the decision to call the police, in response to Ahlal's protected concerted activities on April 2. Vitale and Tanir also informed Erkan that in order to remain employed Ahlal would need to provide not merely a doctor's note regarding his absence, but a psychiatric evaluation stating that he was not a danger to anyone at Amish Market. Vitale and Tanir decided that Ahlal would have only a weekend or so to obtain this psychiatric report. Vitale and Tanir then directed Erkan to send Ahlal a letter stating that he had abandoned his job when Ahlal, unable to obtain the required documentation, did not return to the store. Despite this, Respondent did not call Vitale or Tanir to testify, and there is little evidence regarding the reasoning behind these decisions, beyond the bald fact of Ahlal's protected concerted activity on April 2. The Board has long drawn adverse inferences from a Respondent's failure to call the individual or individuals responsible for making personnel decisions with respect to specific employees in support of purportedly legitimate reasons for doing so. *See, e.g., Hospital Cristor Redentor*, 347 NLRB 722, 742 (2006) (adverse inference drawn from failure to call manager who made the determinations to suspend and discharge employee); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997). I do the same in this case.

For all of the foregoing reasons, I find that General Counsel has established a *prima facie* case that Ahlal engaged in protected concerted activity, and that his suspension and discharge were motivated by Respondent's animus. I find that Respondent has failed to establish by a preponderance of the evidence that it would have suspended and discharged Ahlal in the absence of unlawful motivation.

Conclusions of Law

1. The Respondent, Tribeca Market LLC d/b/a Amish Market, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Rachid Ahlal in retaliation for his protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By suspending Rachid Ahlal in retaliation for his protected concerted activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By threatening employees with termination in retaliation for their support for UFCW Local 1500, Respondent has violated Section 8(a)(1) of the Act.

6. By coercively interrogating employees regarding their union sympathies and activities, Respondent has violated Section 8(a)(1) of the Act.

7. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Remedy

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having discriminatorily suspended and discharged Rachid Ahlal in retaliation for his protected concerted activities, Respondent must offer Ahlal full reinstatement to his former position or to a substantially equivalent position. Respondent must also make Ahlal whole for any loss of earnings or other benefits he may have suffered as a result of the discrimination against him, plus interest, in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to Ahlal's unlawful suspension and discharge, and to notify him in writing that this has been done and that the discharge shall not be used against him.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

Respondent Tribeca Market LLC d/b/a Amish Market, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) Suspending or otherwise discriminating against employees because they engage in protected concerted activities.

[13] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Threatening employees with termination in retaliation for their support for UFCW Local 1500.

(d) Coercively interrogating employees regarding their union sympathies and activities.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days of the date of this Order, offer Rachid Ahlal full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or to any other rights and privileges previously enjoyed.

(b) Make Rachid Ahlal whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the unlawful suspension and discharge, and within 3 days thereafter, notify Ahlal in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the facility at 53 Park Place, New York, New York, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 24, 2010.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC, April 21, 2011

_____
Lauren Esposito
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge you because you engage in protected concerted activities.

WE WILL NOT suspend or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT threaten you with termination in retaliation for your support for and activities on behalf of UFCW Local 1500.

WE WILL NOT coercively interrogate you regarding your union sympathies and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL within 14 days of the date of the Board's Order, offer Rachid Ahlal full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Rachid Ahlal whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Rachid Ahlal, and within 3 days thereafter, notify Ahlal in writing that this has been done and that the suspension and discharge will not be used against him in any way.

TRIBECA MARKET LLC d/b/a
AMISH MARKET
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Room 3614, New York, NY 10278-0104
(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.